

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-1310

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1310

UNITED STATES OF AMERICA,
Appellant,

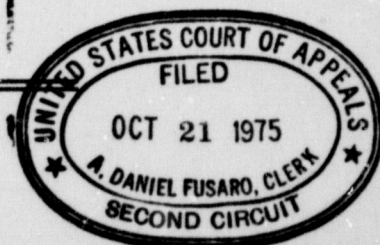
—v.—

ANTHONY LOSCHIAVO,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
Of America.*



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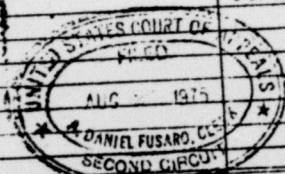
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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE METZNER 73 CRIM. 90

75 13.

TITLE OF CASE THE UNITED STATES		ATTORNEYS For U.S.: X 6069 A 1 Rudolph W. Giuliani, AUSA
vs.		
1) ANTHONY LOSCHIAVO	cts. 1 thru 11-24-73	
2) ANDREW STORMS	cts. 1,2,5,6,7,8. 11-26-73	
3) KINGDON DEWITT	cts. 1 and 9 thru 15 11-26-73	
		For Defendant:



(05) STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk	11/24/73			
J.S. 3 mailed 2, 3- 1.2-10-73	Marshal	11/24/73			
Violation	Docket fee				
Title 18					
Sec. 371 conspiracy to defraud the U.S. (ct.1)					
201(b) & 2 Bribery (ct.2)					
1623 Perjury (cts.3 thru 15)					

FIFTEEN

PROCEEDINGS

DATE	PROCEEDINGS
4-4-73	Filed indictment
4-15-73	Loschiavo- Deft. pleads not guilty. Deft. R.O.R. - ordered photographed and fingerprinted. Storms- Deft. pleads not guilty. Deft. R.O.R. - ordered photographed and fingerprinted. DeWitt- Deft. pleads not guilty. Deft. R.O.R. - ordered photographed and fingerprinted. Case assigned to Judge Metzner. --- Lasker, J.
4-24-73	Lo Schiavo-Filed notice of appearance by Ferber, Marx, Esqs., 317 B'way New York, N.Y. (Wh.3-0003) Storms-Filed notice of appearance by William T. Griffin, Esq., 166 William St. New York, N.Y. (962-5442) De Witt-Filed notice of appearance by John L. Edmonds, Esq., 500 Fifth Ave. New York, N.Y. (354-6363)

- O V E R -

DATE	PROCEEDINGS	A 2
4-30-73	Loschiano-Filed notice of appearance by atty Mortimer Todel 150 E. 58-st 10022-Pl-3-7500 moved to 1 Rockefeller Plaza, NYC 10020(541-4585)	
5-2-73	KINGDON DeWITT - Filed motion for bill of particulars.	
5-3-73	Storms-Filed affidavit and notice of motion for an order granting the de copy of Grand Jury Testimony, dismissing Cts 5 -8 , bill of partic discovery and inspection, etc.	
5-10-73	Loschavio-Filed affidavit and notice of motion for a bill of particulars and discovery and inspection.	
5-10-73	Loschavio-Filed deft's memorandum of law.	
5-11-73	DeWITT- Filed affdvt. and notice of motion for a bill of particulars.	
5-24-73	Storms-Filed supplemental affidavit.	
8-9-73 *	Filed one brown envelope containing affdvt. by gov't pursuant to the court's direction re: names of witnesses--envelope sealed and not to be opened until further order of the Court-Metzner, J.-placed in vault-Room 602.	
8-6-73 *	Filed MEMO End, LOSCHIANO- This motion by deft. for B/P is denied as to item 1; granted as to items 2 and 3; granted as to item 4 to the extent directed by U.S. -v- Baum, *** The motion for discovery is granted as to all items. Compliance with this order shall be completed on or before Aug. 10, 73. So Ordered. METZNER, J.	
8-6-73	DeWITT - Filed MEMO END; This motion is marked withdrawn as moot. So Ordered. METZNER.	
8-6-73	STORMS - Filed MEMO END; The motion for discovery of movant's grand jury testimony is granted. Motion for dismissal of counts 5 through 8 is denied, ***. The motion for B/P is granted as to item 1; denied as to items 2 & 3; granted as to items 4; denied as to items 5 & 6; granted on consent as to items 7 through 24; denied as to items 25 through 30; granted as to item 31. Motion for discovery is granted as to item 4' denied as to item 5; granted as to items 6 & 7 to the extent consented to by the government. Compliance with this order shall be completed on or before Aug. 10-73. So Ordered. METZNER, J.	
8-6-73	DeWITT - Filed MEMO END; Motion is granted as to item 1 and that part of item 2 requesting particulars as to the payment; also granted as to item 2 ***. Compliance with this order shall be completed on or before Aug. 10-73. So Ordered. METZNER, J.	
8-27-73	Filed Government's answer to defendants motions for particulars.	
8-31-73	STORMS- Filed Government's Bill of particulars.	
9-5-73	STORMS-Filed Government Affidavit in opposition of motion to dismiss Cts. 5 thru 8 of Ind.	

DATE	PROCEEDINGS	A	3
9-10-73	Filed Government Notice of Readiness for Trial.		
9-26-73	LOSCHIAVO- Filed affdvt. and notice of motion to suppress.		
Oct-9-73	LOSCHIAVO- Filed Governments affdvt. in opposition to defts motion to suppress.		
9-24-73	LOSCHIAVO- Filed memo endorsed on defts. motion to suppress: After hearing, this motion is denied. -- Metzner, J. (m/n)		
Oct-16-73	Suppression hearing held - Motion denied. -- Metzner, J.		
Oct-17-73	A. STORES- (Atty. present) withdraws his plea of not guilty and pleads guilty to count 1. Plea accepted. P.S.I. ordered. Sentence Nov. 26, 1973. Deft. continued R.O.P. -- Metzner, J.		
Oct-19-73	K. DEWITT- (Atty. present) withdraws his plea of not guilty and pleads guilty to count 12. Plea accepted. P.S.I. ordered. Sentence date Nov. 26, 1973. Deft. continued R.O.R. -- Metzner, J.		
Oct-24-73	LOSCHIAVO- Filed Governments request to charge.		
Oct-24-73	LOSCHIAVO- Jury trial begun before Metzner, J.		
Oct-25-73	LOSCHIAVO- Trial continued.		
Oct-26-73	LOSCHIAVO- Trial continued and adj. to Oct-26-73		
Oct-29-73	LOSCHIAVO- Trial continued		
Oct-30-73	LOSCHIAVO- Trial continued and concluded. JURY VERDICT: count 1 - NOT GUILTY count 2 - GUILTY count 3 - Jury disagreement count 4 - NOT GUILTY. P.S.I. ordered. Sentence adj. 12-11-73 - Bail continued. - Metzner, J.		
Oct-29-73	Loschiavo- Filed Governments request to charge Filed Governments supplemental request to charge.		
Nov. 26-73	STORMS--Filed JUDGMENT(atty. present)--it is adjudge that the deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of four months on Count 1. Counts 2,5,6,7 and 8 are dismissed on motion of defts. counsel with the consent of the govt. It is adjudged that the deft. is continued on present bail until Jan. 26, 1974 at which time he is to surrender in the office of the U.S. Marshal for the SDNY. Metzner, J. (n/m) (copies issued 11/26/73)		
Nov. 26-73	DEWITT--Filed JUDGMENT(atty. present)--It is adjudged that the deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of 6 months on Count 12. Counts 1,9,10,11,13,14 and 15 are dismissed on motion of the defts. counsel with the consent of the govt. It is adjudged that the deft. is continued on present bail until Dec. 10, 1973 at which time he is to surrender in the office of the U.S. Marshal's for the SDNY. Metzner, J. m/n (copies issued 11-26-73)		

DATE	PROCEEDINGS	A	4
Dec. 5-73	Filed LOSCHIAVO- Notice of Motion returnable on 12/11/73 at 10:00 A.M. setting aside the verdict and entering a judgment of acquittal.		
Dec. 5-73	LOSCHIAVO-Filed Memorandum of Law.		
Dec. 11-73	LOSCHIAVO-Filed memo endorsed on Notice of Motion ret. 12/11/73--Motion for a new trial denied. -- So ordered. - Metzner, J. (m/n)		
Dec. 12-73	ANTHONY LOSCHIAVO - Filed Notice of Appeal to the U.S.C.A. from final judgt. entered 12/11/73 (m/n) Filed Judgment # 74,009, that		
Dec. 11-73	ANTHONY LOSCHIAVO - /The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE year and fined \$5,000.00. The defendant is to stand committed until fine is paid or is otherwise discharged according to law. The defendant is released on his own recognizance pending appeal. -- Metzner, J. (ories issued).		
****8-1-73	Filed Change of Address of atty for Anthony Loschiavo		
12-11-73	Filed Memo-End on Motion Filed Dec 5, 1973-Motion for a new trial denied		
12-26-73	Filed transcript of proceedings dated Oct 24, 25, 26, 73		
10-24-73	Filed in Court-Loschiavo Voir Dire Request of Deft Loschiavo		
Jan 2-74	Andrew Storms- Filed letter by defts. Attorney with memo endorsed: The attached letter will be treated as a formal application for reduction of sentences. Deft. A. Storms pled guilty to a charge of conspiracy to bribe a public official. I have reviewed the facts and circumstances in the case and I find that the four months sentence imposed was extremely lenient. The Application is denied. So ordered. - Metzner, J. m/n		
Dec-27-73	A. Loschiavo- Filed notice that the record on appeal has been certified and transmitted to the USCA for the 2nd Circuit on 12-27-73.		
1-16-74	Filed commitment & entered return, DSH delivered to <i>For Mr. J. J. 1-17-74</i>		
Jan. 24-74	STORMS, Andrew - Filed Order fixing surrender date--There will be no further adjournments granted - So ordered Metzner, J. (m/n)		
Jan 28-74	Filed transcript of record of proceedings, dated 1-16-73		
Jan 31-74	Filed transcript of record of proceedings, dated 12-11-73		
Jan 31-74	Loschiavo - Filed transcript of record of proceedings, dated 10-26-29-30-73		
Feb 1-74	Storms - Filed commitment & entered return, DSH delivered to <i>For Mr. J. J. 1-17-74</i>		
4-227-74	LOSCHIAVO-Surrender date adjourned to 4/24/74 - Pierce, J.		
4-5-74	LOSCHIAVO - Filed True copy U.S.C.A. that the judgment is hereby affirmed. - Clerk		
5-16-74	Loschiavo Filed commitment & entered return, DSH delivered to <i>For Mr. J. J. 1-17-74</i>		
6-4-74	Deft. H - Filed Transcript of record of proceedings, dated 10-14-73		
7-12-74	ANTHONY LOSCHIAVO - Filed Notice of Motion for Reduction of Sentence returnable 7/19 at 10AM		
7-14-74	Storms - Filed Transcript of record of proceedings, dated 10-11-73		
Aug- 2-74	ANTHONY LOSCHIAVO- Filed memo endorsed on deft's motion for reduction of sentence: Motion denied. So ordered. - Metzner, J. m/n		
10-11-74	<i>Loschiavo - Filed commitment & entered return, DSH delivered to</i>		
11-22-74	LOSCHIAVO - Filed from Supreme Court copy of true copy - that petition for a writ of certiorari to U.S.C.A. 2nd Circuit is hereby denied.		

C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date of Judgment
7-24-75	LOSCHIAVO- Filed memorandum-order that count 3 of the indictment is dismissed. So ordered. - Metzner, J. m/n	
5-21-75	LO SCHIAVO--Filed govts. notice of appeal to the USCA from the order dismissing ct. 3 of the indictment. (copies issued and mailed to Mortimer Todel, of 1 Rockefeller Plaza, NYC 10020, atty. for deft. and to deft. at 138-22 11th Ave, Whitestone, Queens, NY)	
1-1-75	<i>g. Schiavo - Filed notice that the original record on appeal has been certified & transmitted to the USCA 7/6/75</i>	
05-05-75	Filed defts. affdt. and notice of motion for an order vacating judgment of conviction, re: on: date to be fixed by court. (as to deft. LOSCHIAVO) under 28:2255	
05-05-75	Filed defts. memorandum of law in support of above motion. (as to deft. LOSCHIAVO)	
5-15-75	LOSCHIAVO--Filed govts. memorandum of law.	
5-20-75	LOSCHIAVO- Filed true copy of USCA order that the appeal from the D.C. order is dismissed. m/n	
5-17-75	ANTHONY LOSCHIAVO- Filed opinion #42605 ... deft. moved to vacate the judgment of conviction and sentence imposed upon him under 28:2255 on the ground that the public official he was convicted of bribing was not a federal public official as defined in 16:201. For reasons stated herein, the motion is granted. So ordered. -- Metzner, J. m/n issued copies to Marshal.	
3-15-75	LO SCHIAVO--Filed govts. notice of appeal to the USCA from the order of June 17, 1975 granting the petitioner's motion to vacate the judgment of conviction. (copies mailed to defts. atty. Mortimer Todel, 1 Rockefeller Plaza, NYC 10020 and to deft. at 138-22 11th Ave, Whitestone, Queens, NY)	

The Grand Jury further charges:

From in or about October, 1971, up to and including May, 1972, in the Southern District of New York, ANTHONY LOSCHIAVO and ANDREW STORMS, the defendants, unlawfully, wilfully and knowingly did, directly and indirectly, corruptly give, offer and promise things of value, to wit, a total sum of \$15,000 in United States currency, to public officials of the United States, namely, John Sanders and Pedro Morales (employees of the New York Model Cities Administration and persons acting for and on behalf of the United States in an official function under and by authority of the United States Department of Housing and Urban Development, which, at all times relevant to this indictment, in substantial part funded and supervised the New York City Model Cities Administration): (a) with intent to influence official acts; (b) with intent to influence said public officials to commit and aid in committing, and collude in, and allow, a fraud, and make opportunity for the commission of a fraud, on the United States; and, (c) with intent to induce said public officials to do and to omit to do acts in violation of their lawful duties, to wit, to induce and influence said public officials to recommend that the New York City Model Cities Administration approve a lease for a building owned by the defendant ANTHONY LOSCHIAVO located at 177-183 East 123rd Street, New York, New York.

(Title 18, United States Code, Sections 201(b) and 2.)

LoSchiavo, paid \$7,500 in cash to Andrew Storms.

5. In or about November 1971, the defendant Andrew Storms paid \$5,000 in cash to Pedro Morales.

6. In or about November 1971, Pedro Morales delivered \$2,500 in cash to John Sanders.

7. In or about February 1972, the defendant LoSchiavo paid \$2,500 in cash to Pedro Morales at the Raskin Carpet Store at 2264 Third Avenue.

8. In or about February 1972, Pedro Morales delivered \$1,250 in cash to John Sanders.

9. In or about May of 1972, Anthony LoSchiavo paid \$7,500 in cash to Pedro Morales at the Raskin Carpet Store at 2264 Third Avenue.

10. In or about May 1972, Pedro Morales delivered \$3,750 in cash to John Sanders.

Once you have determined that the offense has been established under the guidelines I have just given you, then the crime of conspiracy is complete, regardless of which of the conspirators did the overt act. Furthermore, at this point, the success or failure of the conspiracy to accomplish the common object or purpose is immaterial.

Now, the second count of the indictment is the bribery count. It charges that from in or about October 1971 up to and including May 1972, Anthony LoSchiavo and

Andrew Storms unlawfully, knowingly and wilfully did corruptly give, promise or offer \$15,000 to John Sanders and Pedro Morales, employees of the New York City Model Cities Administration, who were then acting for the United States in an official function under the authority of the United States Department of Housing & Urban Development, with intent to influence official acts, namely, to induce and influence Sanders and Morales to recommend that the New York City Model Cities Administration approve a lease for a building owned by defendant LoSchiavo, located at 177 East 123rd Street, New York.

In order for you to return a verdict on this count against the defendant, you must be convinced that each of the following three elements has been proved beyond a reasonable doubt:

First, that some time between October 1971 and May 1972 the defendant wilfully and knowingly gave or caused to be given \$15,000 to John Sanders and Pedro Morales.

Second, that at the time Morales and Sanders were public officials of the United States, acting in their official capacity.

Third, that the defendant paid this money to Sanders and Morales with the specific and corrupt intent to influence Sanders' and Morales' decision to recommend

1
2 approval of a lease for a building owned by LoSchiavo at
3 177 East 123rd Street.

4 As to the first element to be proved beyond a
5 reasonable doubt, the mere fact that money was given to
6 Sanders or Morales is not enough to satisfy this element of
7 the offense. You must find that the money was given know-
8 ingly and wilfully by the defendant. The definitions I
9 have already given you of "knowingly and wilfully" under
10 the conspiracy count apply equally as well to this count.

11 The second element which must be proved is that
12 at the time of this offense Sanders and Morales were public
13 officials of the United States, acting in their official
14 capacity. Since the proof shows without dispute that the
15 United States paid 80 per cent of Sanders' and Morales'
16 salary and paid 100 per cent of the cost of the program which
17 they were administering, they are public officials of the
18 United States and were acting in their official capacities
19 in connection with this lease.

20 The third element which must be proved beyond a
21 reasonable doubt is that the money was paid corruptly, that
22 is, that it was paid or caused to be paid to Sanders and
23 Morales with the specific intent to influence an official
24 act, namely, to approve the lease for the building owned by
25 the defendant at 177 East 123rd Street.

H 10
Mr. Sullivan

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUN 17 11 53 AM '75
S.D. OF N.Y.

----- x
UNITED STATES OF AMERICA :
 :
-against- :
 :
ANTHONY LOSCHIAVO, :
 :
Defendant. :
----- x

73 Cr. 290
73-1190

#42605

METZNER, D. J.:

Anthony Loschiavo has moved pursuant to 28 U.S.C. § 2255 (1970) to vacate the judgment of conviction and sentence imposed upon him on the ground that the public official he was convicted of bribing was not a federal public official as defined in 18 U.S.C. § 201.

Movant was indicted on April 4, 1973, and charged with conspiracy, bribery and two counts of perjury. After trial a jury found him guilty of bribery (18 U.S.C. § 201(b)), acquitted him of conspiracy and one count of perjury, and failed to reach a verdict on the other perjury count.

Subsequently, movant was sentenced to a one year prison term and a \$5,000 fine. His conviction was affirmed without opinion, 493 F.2d 1399 (2d Cir. 1974), and the Supreme

MICROFILM

JUN 17 1975

Court denied certiorari, 419 U.S. 872 (1974). Movant has completed his prison sentence and has paid the fine which was imposed. The perjury count upon which the jury disagreed was dismissed by this court on February 24, 1975, inasmuch as the government showed no interest in pursuing it.

In convicting movant of bribery, the jury necessarily found that the bribe was received by one Pedro Morales, an employee in the Model Cities Program. Section 201 requires that Morales be a public official of the United States acting in his official capacity and the jury was so charged. The jury was also charged without objection, however, that:

"Since the proof shows without dispute that the United States paid 80 per cent of Sanders' and Morales' salary and paid 100 per cent of the cost of the program which they were administering, they are public officials of the United States and were acting in their official capacities in connection with this lease."

It should be noted that Sanders was Morales' superior who split the bribe with Morales.

On appeal, movant argued that there was no basis of jurisdiction under Section 201 because there was no federal money involved and HUD was not directly affected by the bribe.

Almost one year after affirming movant's conviction without opinion, the Second Circuit reversed the bribery conviction

of two other men who had also been accused of bribing Pedro Morales in order to obtain a Model Cities lease. United States v. Del Toro, 74-2021, 2035 (2d Cir. February 27, 1975). The result reached by the court was dictated by its conclusion that Morales was not a federal public official within the scope of Section 201. Id. at 1970. It was this opinion which prompted the instant motion.

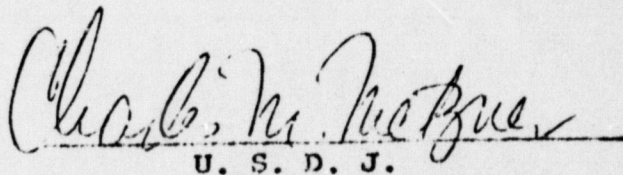
The government opposes the application, attempting to distinguish the facts in Del Toro from those in this case. It is also argued that Loschiavo waived this issue at trial.

There is no valid distinction between the Del Toro case and movant's case on the key issue of the nature of Morales' employment. Since this court did not have jurisdiction over the crime charged, the conviction must be vacated. The charge on the jurisdictional element was, in light of Del Toro, a plain error which clearly affected substantial rights of the movant. It may therefore be considered at this juncture even though not raised at trial. Fed. R. Crim. P. 52(b).

Motion granted.

So ordered.

Dated: New York, N.Y.
June 16, 1975


U. S. D. J.

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Olga P. Grunpp

being duly sworn
deposes and says that he is employed in the office of the
United States Attorney for the Southern District of New
York.

Stating also that on the *20th* day of *October, 1975*
she served a copy of the within *(2) Briefs + Appendix.*
by placing the same in a properly postpaid franked envelope
addressed:

Martimer Todel, Esq.
1 Rockefeller Plaza.
N.Y. N.Y. 10020

And deponent further says that she sealed the said envelope
and placed the same in the mailbox for mailing at the United
States Courthouse, Foley Square, Borough of Manhattan, City
of New York

Olga P. Grunpp

Sworn to me before this

20th day of *October, 1975*

Mary C. Avent

MARY C. AVENT
Notary Public, State of New York
No. 63-450237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977